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8 Twentieth Century Fox Film Corporation, and  
Twentieth Century Fox Home Entertainment LLC  
9

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA  
12

13 MARK GABLE a/k/a MARK PIZZUTI,

14 Plaintiff,

15 v.

16 NATIONAL BROADCASTING  
COMPANY ("NBC"), a California  
17 corporation, GREGORY THOMAS  
GARCIA, an individual; 20th  
18 CENTURY FOX FILM  
CORPORATION, a corporation, 20th  
19 CENTURY FOX HOME  
ENTERTAINMENT AND DOES 1  
20 through 10, inclusive,

21 Defendants.  
22

Case No. CV 08-4013 SVW (FFMx)

The Honorable Stephen V. Wilson

**REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANTS'  
MOTIONS FOR SUMMARY  
JUDGMENT**

Time: 1:30 p.m.  
Date: March 23, 2009  
Ctm: 6

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## **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiff's Opposition ("Opp.") to Defendants' motions for summary judgment fails to raise a genuine issue of material fact as to either access or substantial similarity of protected expression. Plaintiff's access claim rests solely on his undocumented assertion that he mailed his unsolicited script *Karma!* to someone at Defendant Garcia's former talent agency, The Gersh Agency ("TGA"), but not to Garcia's individual agent, almost a decade before Garcia created *My Name is Earl* ("Earl"). But Plaintiff cannot establish that anyone at TGA read Plaintiff's script, much less provided it to Garcia. Summary judgment is mandated for that reason alone.

Unable to refute these basic dispositive facts, Plaintiff's Opposition instead impugns the credibility of the third-party TGA witnesses (who have no stake or financial interest in the outcome of this case) and devolves into unsupported invective that mischaracterizes their testimony and focuses on collateral issues irrelevant to this case. Courts have consistently held that such unsupported and collateral attacks on a witness's credibility cannot avoid summary judgment.<sup>1</sup>

Even assuming, for the sake of argument, that there were disputed issues of fact on access, summary judgment is required on the independent ground that Plaintiff has failed to raise a genuine issue of material fact as to substantial similarity of protected expression between the two works at issue. Many of the so-called similarities relied on by Plaintiff are so generalized and abstract as to

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<sup>1</sup> Plaintiff filed a "Statement of Genuine Issues of Material Fact" as well as Evidentiary Objections. Defendants have directly responded to many of Plaintiff's purported "issues" in this Reply. Plaintiff's "Statement of Genuine Issues" ("GIMF"), however, fails to comply with L.R. 56-2, which requires that it contain only a "concise statement setting forth the material facts as to which it is contended there is a genuine issue necessary to be litigated." Plaintiff's GIMF also contains a number of entirely immaterial purported "issues" without, in many instances, citing to any supporting evidence. To the extent that Plaintiff's "issues" are irrelevant and unsupported, Defendants have not responded.

1 constitute nothing more than uncopyrightable ideas and unprotected *scenes à faire*.  
 2 Indeed, more often than not, Plaintiff's purported "similarities" are not similar at  
 3 all, when looked at in the context of the works themselves

4 David Nimmer's declaration does not change this. Although an esteemed  
 5 copyright scholar, Nimmer is not a literary expert. Moreover, in deposition,  
 6 Nimmer actually *confirmed* the absence of substantial similarity of protected  
 7 expression. Critically, on cross-examination, Nimmer stated that only one of the  
 8 analytical categories under the Ninth Circuit's extrinsic test – namely, theme – is  
 9 substantially similar, and admitted that the respective plots, characters, settings,  
 10 moods, dialogue, and sequences of events are not substantially similar. Substantial  
 11 similarity of theme alone cannot support a claim for copyright infringement.

12 Plaintiff's assertion that a combination of elements raises an issue of  
 13 material fact under the extrinsic test is unavailing. The primary case on which  
 14 Plaintiff relies, *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002), is inapposite  
 15 because it rested on defendant's concession of access and because it involved a  
 16 pattern of similarities that does not exist here. Cases following *Metcalf* have  
 17 refused to apply it where, as here, a defendant disputes access and where no pattern  
 18 of similarities exists. Defendants are entitled to summary judgment.

19 **II. PLAINTIFF HAS NOT RAISED GENUINE ISSUES OF MATERIAL**  
 20 **FACT AS TO ACCESS.**

21 Plaintiff concedes that to raise a genuine issue of material fact as to access  
 22 he must show that Defendants had more than a "bare possibility" of access; he  
 23 must demonstrate that Defendants had a *reasonable opportunity* to view Plaintiff's  
 24 work. Opp. at 19. Plaintiff has failed to present the "significant, affirmative and  
 25 probative evidence" of access required to establish that Defendants had a  
 26 "reasonable opportunity" to view Plaintiff's work. *Jorgensen v. Epic/Sony*  
 27 *Records*, 351 F.3d 46, 51 (2d Cir. 2003). To the contrary, Plaintiff offers only  
 28 naked "speculation or conjecture," which cannot defeat summary judgment.



1 *Merrill v. Paramount Pictures Corp.*, No. CV 05-1150 SVW (MANx), 2005 WL  
2 3955653, \* 7 (C.D. Cal. Dec. 19, 2005) (Wilson, J.) (internal citations omitted).

3 The Opposition asserts (at 9) that *Karma* and *Earl* are so similar that  
4 “copying must have occurred” and implies that Nimmer agrees with this statement.  
5 In fact, Nimmer said the exact opposite, testifying unequivocally that he could not  
6 conclude that *Earl* was copied from *Karma*!. Supplemental Declaration of Jill P.  
7 Rubin (“Supp. Rubin Decl.”), Exhibit (“Exh.”) 1 (Deposition of David Nimmer  
8 (“Nimmer Depo.”) at 224:18-225:20).

9 Plaintiff’s only alleged source of access is David Gersh of TGA, the owner  
10 of the company where Ken Neisser, Garcia’s former agent, once worked.<sup>2</sup>  
11 Through a convoluted, speculative theory, Plaintiff conjectures that David Gersh (a  
12 theatrical agent) received and read his script for a theatrical motion picture and  
13 passed it on to Neisser (a *television* agent), who supposedly gave it to Garcia, who  
14 held onto the script for years before creating *Earl* and in the meantime switched to  
15 another talent agency. Such a theory cannot withstand scrutiny.

16 As established in Defendants’ Motions for Summary Judgment (“Mot.”) at  
17 9-10, Plaintiff has no documentary evidence that he actually sent his script to  
18 anyone. This militates against his access claim. *See, e.g., Merrill*, 2005 WL  
19 3955653 at \* 8; *Jorgensen*, 351 F.3d 46, 52 (affirming summary judgment where  
20 plaintiff produced “no reasonable documentation that he actually mailed [tapes of  
21 the allegedly infringed work]” to corporate employees”); *cf. Rice v. Fox*, 330 F.3d  
22 1170, 1178 (9th Cir. 2003) (although plaintiff claimed he actually discussed project  
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25 <sup>2</sup> Neisser’s representation of Garcia ended in 1999, when Garcia left TGA and  
26 signed with CAA. Declaration of Gregory Thomas Garcia in Support of  
27 Defendants’ Motions for Summary Judgment (“Garcia Decl.”) ¶7. Neither Gersh  
28 nor Neisser (nor TGA) has a financial interest in either Garcia or *My Name is Earl*,  
which was created and sold long after Garcia retained a new agency. Garcia Decl.  
¶7. Neisser no longer works in the entertainment business. Supp. Rubin Decl., Ex.  
4 (Deposition of Kenneth Neisser (“Neisser Depo.”) at 85:20-86:23).

1 with defendant's agent, access claim was "based on speculation, conjecture, and  
2 inference.").

3 Second, the only "evidence" that Plaintiff proffers is his claim that he mailed  
4 his script to David Gersh. But David Gersh was not Garcia's agent; Ken Neisser  
5 was. The mere mailing of a script to a company is insufficient to raise a genuine  
6 issue of fact as to access. Mot. at 9-11 (citing cases rejecting corporate receipt  
7 doctrine); *Merrill*, 2005 WL 3955653, \*7-8; *Jorgensen*, 351 F.3d at 52-53.

8 Third, the uncontroverted evidence establishes as a matter of law that  
9 Garcia, Gersh, and Neisser never read Plaintiff's script. Both Gersh and Neisser  
10 testified that they had no knowledge of Plaintiff's script and did not give it to  
11 Garcia. This testimony stands uncontroverted, again by itself mandating summary  
12 judgment for Defendants on the access issue.

13 Fourth, even assuming that, contrary to their uncontroverted testimony,  
14 Gersh or Neisser read Plaintiff's script, neither of those individuals supervised or  
15 had creative input over *Earl*. For yet this additional reason, Plaintiff has failed to  
16 raise an issue of fact as to access. Mot. at 11-12; see *Meta-Film Assoc., Inc. v.*  
17 *MCA, Inc.*, 586 F. Supp. 1346, 1357-58 (C.D. Cal. 1984). Cf. *Rice* 330 F.3d at  
18 1178 (access claim was "based on speculation, conjecture, and inference" even  
19 though plaintiff claimed he actually spoke with defendant's agent and was a client  
20 of the same agency).

21 Finally, Gersh and Neisser both had policies not to review unsolicited  
22 submissions. Declaration of David Gersh in Support of Defendants' Motions for  
23 Summary Judgment ("Gersh Decl.") at ¶¶ 2,4; Supp. Rubin Decl., Exh. 4  
24 (Deposition of David Gersh ("Gersh Depo.") at 20:14-24, 26:11-27:3, 29:25-  
25 30:21); Declaration of Ken Neisser in Support of Defendants' Motions for  
26 Summary Judgment ("Neisser Decl.") at ¶¶ 3,4; Supp. Rubin Decl., Exh. 3,  
27 (Deposition of Kenneth Neisser ("Neisser Depo.") at 52:17-53:4; 96:25-97:2; 98:8-  
28 19). Plaintiff has proffered no evidence to show that Gersh and Neisser failed to

1 follow those policies. This, too, obviates Plaintiff's access claim. *See 4 Nimmer*  
 2 *On Copyright*, § 13.02[A], at 13-18 ("access is negated to the extent that the  
 3 defendant company can demonstrate that its established procedures insulate  
 4 decision-making and creative personnel from unsolicited submissions").<sup>3</sup>

5 Recognizing that he can offer no evidence, Plaintiff raises a hodgepodge of  
 6 frivolous arguments, none of which raises a material fact issue as to access.

7 *First*, even though the uncontroverted evidence establishes that only Ken  
 8 Neisser acted as Garcia's agent, Plaintiff argues that David Gersh was also  
 9 Garcia's agent. Even if true (which it is not), the argument is irrelevant. As noted  
 10 above, it is undisputed that David Gersh never read Plaintiff's script and has no  
 11 recollection of ever having received it. It is also undisputed that Gersh played no  
 12 supervisory or creative role in connection with *Earl*.

13 Moreover, the evidence establishes that David Gersh never acted as Garcia's  
 14 agent or otherwise was involved in his career. Gersh Decl. ¶7. Plaintiff's only  
 15 argument relies entirely on a "Continuity of Management" provision in the  
 16 standard WGA form rider attached to Garcia's contract, on which David Gersh's  
 17 name appears. However, Gersh testified that his name appeared on the document  
 18 only as a matter of compliance with standard agency practice and that it was  
 19 customary for either him, his brother, or his father, as owners of the business, to be

20 <sup>3</sup> Plaintiff argues that "there is substantial evidence that there was no formal or  
 21 uniform agency policy or procedure concerning the destruction (or return) of  
 22 unsolicited scripts in 1995." Opp. at 6. Plaintiff is wrong. Both Neisser and Gersh  
 23 testified that there *was* such a policy. Gersh Decl. at ¶¶2,4; Gersh Depo. at 20:14-  
 24 24, 26:11-27:3, 29:25-30:21; Neisser Decl. at ¶¶3,4; Neisser Depo at 52:17-53:4.  
 25 No one testified to the contrary. The fact that the current TGA custodian of  
 26 records testified that no written copy of the policy can be *located* now (Declaration  
 27 of Maureen Ferrero in Support of Plaintiff's Opposition ¶4) – some fourteen years  
 28 later – does not mean that such a policy did not exist. Plaintiff also claims that  
 Neisser "conceded" that there was no agency-wide policy (Opp. at 6), but Neisser  
 did no such thing. Rather, he testified that the unsolicited submissions policy "was  
 a topic that was discussed with regularity on an informal basis. I would remind  
 people in my department. We do not accept unsolicited material . . . This was a  
 constant, if anything was ever discussed agency-wide, it was you do not accept  
 unsolicited material . . . It was certainly a rule in my department. And I know it  
 was a rule in the feature lit department." Neisser Depo. at 90:17-92:9.

1 listed on such a document even where they had no actual agent responsibility.  
 2 Gersh's testimony stands uncontroverted.

3       *Second*, Plaintiff relies on *Bevan v. Columbia Broad. Sys., Inc.*, 329 F. Supp.  
 4 601, 609-10 (S.D.N.Y. 1971), to argue that the receipt of a manuscript at a  
 5 defendant's principal corporate office is sufficient to raise a triable issue of fact as  
 6 to access. However, the so-called corporate receipt doctrine of *Bevan* is not the  
 7 law. First, Plaintiff mis-cites *Bevan* as a Ninth Circuit case and incorrectly refers  
 8 to the "Court of Appeal [sic]" in quoting from the opinion. In fact, *Bevan* is a  
 9 district court case out of the Southern District of New York. Second, the Ninth  
 10 Circuit has never adopted *Bevan*'s "corporate receipt" doctrine. To the contrary,  
 11 subsequent courts have uniformly criticized *Bevan* and rejected the notion that bare  
 12 corporate receipt is sufficient to raise an issue of fact as to access. *See Meta-Film*,  
 13 586 F. Supp. at 1357-58;<sup>4</sup> *see also Dimmie v. Carey*, 88 F. Supp. 2d 142, 146-47  
 14 (S.D.N.Y. 2000) (characterizing *Bevan* as "(arguably) out-dated") (collecting  
 15 cases); *Jorgensen*, 351 F.3d 46, 53 (2d Cir. 2003) (declining to adopt the doctrine)  
 16 (collecting cases). Indeed, numerous courts – including this Court – have since  
 17 granted summary judgment where, as here, plaintiff merely relies on the corporate  
 18 receipt doctrine, *Merrill*, 2005 WL 3955653 at \*7; *see also Rodriguez v. Heidi*  
 19 *Klum Co. LLC*, No. 05 Civ. 10218 (LAP) 2008 WL 4449416, \*2 (S.D.N.Y. Sept.  
 20 30, 2008) (finding no access although plaintiff alleged she showed treatment to  
 21 defendant's agents).

22       Third, Plaintiff attacks the credibility of third parties David Gersh and Ken  
 23 Neisser.<sup>5</sup> However, where, as here, the moving party's declarations are unopposed,

24 <sup>4</sup> Plaintiff tries to distinguish *Meta-Film* by arguing that the *Meta-Film* plaintiff  
 25 "offered not a shred of evidence of access" Opp. at 24. But there is even *less*  
 26 evidence of access here than in *Meta-Film*, where the initial link in the purported  
 access chain admitted receiving plaintiff's script. *Meta-Film*, 586 F. Supp. at  
 1353.

27 <sup>5</sup> Plaintiff also tries to create a triable issue of fact by challenging Garcia's  
 28 credibility based on his tongue-in-cheek responses to media interviewers regarding  
 immaterial issues. Opp. at 14-16. This shows merely that Garcia is a comedy  
 (...continued)

1 “the court must accept facts properly alleged therein.” *Weygand v. CBS Inc.*,  
 2 43 U.S.P.Q.2d 1120, 1124 (C.D. Cal. 1997); *see Fogerty v. MGM Group Holdings*  
 3 *Corp, Inc.*, 379 F.3d 348, 353-55 (6th Cir. 2004) (plaintiffs do not create triable  
 4 issues simply by challenging the credibility of defense witnesses); *Shur-Value*  
 5 *Stamps v. Phillip Petroleum Co.*, 50 F.3d 592, 597 n.5 (8th Cir. 1995) (“In  
 6 attacking the movant party’s witness’ credibility ... the nonmovant must show  
 7 concrete evidence.”); *Mowry v. Viacom Int’l Inc.*, No. 03 Civ. 3090 (AJP) 2005  
 8 WL 1793773,\*8, (S.D.N.Y. July 29, 2005) (no access because court would have  
 9 had to assume that defendants lied when they said that they had never heard of  
 10 plaintiffs screenplay); *Tomasini v. Walt Disney Co.*, 84 F. Supp. 2d 516, 521  
 11 (S.D.N.Y. 2000) (no issue of fact as to access where plaintiff merely attacked the  
 12 alleged intermediary’s credibility); *Cox v. Abrams*, No. 93 Civ 6899 (RJW), 1997  
 13 WL 251532 at \*4 (S.D.N.Y. May 14, 1997) (same); *McFarlane v. Sheridan Square*  
 14 *Press, Inc.*, 91 F.3d 1501, 1514 (D.C. Cir. 1996) (no issue of fact when there was  
 15 conflict between two witnesses’ recollections of a conversation as the differences  
 16 were “so narrow that it appears to reflect only sloppiness and a slight over-  
 17 generalization, not deceit”).<sup>6</sup> In sum, like the unsuccessful plaintiff in *Mowry*,

18 (...continued)  
 19 writer. *See Fogerty v. MGM Group Holdings Corp, Inc.*, 379 F.3d 348, 353-55  
 20 (6th Cir. 2004) (alleged inconsistencies in witness testimony insufficient to  
 21 independent create a genuine issue of material fact as there were “[t]oo many  
 22 competing inferences” as to why the statements might have been made); *Carlton v.*  
*Steele*, 278 Fed. Appx. 352, 354-55 (5th Cir. 2008) (contradictory statements by  
 plaintiff who was both mad at an individual and did not know that individual did  
 not raise a material issue of genuine fact or create and an inference that he was  
 lying regarding other material issues).

23 <sup>6</sup> The case on which Plaintiff relies, *U.S. v. Butcher*, 557 F.2d 666 (9th Cir. 1977),  
 24 is inapposite. First, *Butcher* concerned credibility determinations made at a jury  
 25 trial, not in connection with summary judgment. *See Weygand*, 43 U.S.P.Q.2d at  
 26 1124 (“[t]he opposing party may be able to attack the declarants’ credibility if the  
 case goes to trial, ‘but such impeachment would affect the weight of the evidence,  
 not its admissibility, and it is immaterial for summary judgment purposes.’”) (internal citations omitted). Second, Plaintiff acknowledges (Opp. at 8) that  
 27 *Butcher* requires a showing that the witness “knowingly testified falsely”  
 28 concerning a material matter. Plaintiff cannot and here has not even attempted to  
 make such a showing.



1 Plaintiff here improperly asks this Court to speculate that the TGA witnesses are  
 2 lying. Plaintiff's unsupported assertions cannot give rise to a genuine issue of  
 3 material fact.<sup>7</sup>

4 *Finally*, Plaintiff seeks to establish access through so-called "expert" Eric  
 5 Sherman. To the extent Sherman tries to raise an issue of fact based on his view of  
 6 industry custom and practice, the testimony is inadmissible. *See Jinro Am. Inc. v.*  
 7 *Secure Inv., Inc.*, 266 F.3d 993, 1005-06 (9th Cir. 2001) (refusing to allow expert  
 8 to testify that Korean businesses are corrupt and engage in complicated business  
 9 transactions to evade Korean currency laws); *U.S. v. Angelilli*, 660 F.2d 23, 41 (2d  
 10 Cir. 1981) (finding that allowing jury instruction permitting inference of individual  
 11 behavior from evidence of custom was in error, since doing so "would defy the

12 <sup>7</sup> Regardless, Plaintiff's purported challenges to these individuals' credibility are  
 13 both inaccurate and immaterial. The examples of Plaintiff's mischaracterizations  
 14 are legion. *See e.g.*, Opp. at 5. (Although Plaintiff asserts that Gersh was listed by  
 15 Garcia on the WGA rider, nothing in the record indicates that Garcia was the one  
 16 who wrote Gersh's name on that document.); Opp. at 5; Neisser Depo. at 25:17-  
 17 26:1; Gersh Depo. 44:1-47:3 (Plaintiff implies that Gersh and Neisser worked in  
 18 the same department, when in fact Gersh was in the features department and  
 19 Neisser worked in television.); Opp. at 6, 22, Second Amended Complaint  
 20 ("SAC"), Garcia Decl. at ¶¶6,7,17, Neisser Decl. at ¶2 (Plaintiff alleges that  
 21 Neisser and Gersh are self-interested; in truth, neither are parties to the litigation,  
 22 and neither receives commissions from *Earl*, which was created after Garcia was  
 23 no longer represented by The Gersh Agency.); Opp. at 5, Neisser Depo. at 88:22-  
 24 89:19 (Plaintiff asserts that Gersh "would occasionally drop in on Neisser's  
 25 television literary department meetings, even though Neisser actually testified that  
 26 he had no regular meeting with Gersh and that Gersh did not attend Neisser's  
 27 meetings, although "it is possible in ten years he might have dropped in to say  
 28 something."); Opp. at 5; Neisser Depo. at 43:9-45:11; Gersh Depo. at 44:1-47:3,  
 88:22-90:2 (Plaintiff claims that Gersh and Neisser "worked in close proximity,"  
 an inference drawn from the mischaracterization of their testimony regarding the  
 nature and frequency of meetings at TGA in 1995. However, despite the passage  
 of fourteen years, both men testified quite clearly that, while it is possible that  
 Gersh and Neisser may have both attended some all-agent meetings – Gersh was  
 not definitive about whether the current practice of weekly all-agent meetings had  
 begun in the mid-'90s – Gersh and Neisser did not attend each other's department  
 meetings, had separate business practices, and had only informal and infrequent  
 dealings with each other.); Plaintiff's Statement of Genuine Issues of Material Fact  
 (No. 34), Neisser Depo. at 40:2-41:3; 76:23-77:12; Gersh Depo. at 14:15-15:1  
 (Plaintiff states that "Neisser and Gersh contradicted each other's testimony as to  
 whether TGA was on one, two, or three floors in 1995," even though Neisser  
 actually testified that he started on the second floor and moved to the first floor and  
 Gersh testified that he could not remember how many floors TGA occupied in  
 1995.).

1 principle of the individuality of guilt to hold that a defendant's mere membership  
 2 in an organization practicing a particular type of crime could be used to show that  
 3 the defendant himself committed such a crime.").

4 In any event, Sherman's testimony actually underscores the *absence* of  
 5 access as a matter of law. Sherman conceded, among other things, that he (i) has  
 6 no personal knowledge of TGA's policies and practices in 1995 (or any other time)  
 7 regarding unsolicited scripts. Supp. Rubin. Decl., Ex. 2, (Deposition of Eric  
 8 Sherman ("Sherman Depo.") at 77:9-24); (ii) has no personal knowledge whether  
 9 anyone at TGA read or even received Plaintiff's script.<sup>8</sup> *Id.* at 25:14-17, 44:12-23;  
 10 and (iii) does not know David Gersh or Ken Neisser or have knowledge of David  
 11 Gersh's willingness in 1995 to read unsolicited scripts. *Id.* at 39:6-9. Sherman  
 12 conceded that, if TGA had received Plaintiff's script, there were a number of  
 13 "hypothetical" paths the script could have followed. *Id.* at 43:23-44:23. Namely  
 14 the script could have been "shredded, returned, read, summarized or not." *Id.* at  
 15 41:15-41:18. Sherman also conceded that the script is rife with grammar, spelling,  
 16 and typographical errors, which would discourage those in the entertainment  
 17 industry from reading it, as would the stars, moons, and glitter in the envelope. *Id.*  
 18 at 26:18- 29:3, 48:9-15. Finally, Sherman's own writings establish that, as a matter  
 19 of custom and practice, literary agencies like TGA in the 1990s had policies not to  
 20 read unsolicited manuscripts like Plaintiff's *Karma!*. See *Id.* at 39:24-40:11, 50:2-  
 21 51:11, Exs. 411, 412.<sup>9</sup>

22 <sup>8</sup> On the date of filing for this Reply, and one week after Sherman's deposition,  
 23 Plaintiff served an Errata Sheet (clearly based on a conversation between Sherman  
 24 and Plaintiff's attorney) in which Sherman attempts to recant his definitive  
 25 statement that he has "no specific facts" (Sherman Depo. at 44:23) as to whether  
 26 anyone at TGA read *Karma!* and instead, attempts to refer to the speculative and  
 unsupported statements in his declaration and deposition as somehow constituting  
 "specific facts." Such eleventh-hour actions wholly undermine any credibility  
 Sherman might otherwise have.

27 <sup>9</sup> Finally, although Plaintiff states (Opp. at 8) that Plaintiff was struck by the so-  
 28 called "striking similarities" between the works at issue, he does not argue that  
 striking similarity is a substitute for proof of access. Nor could he. As discussed  
 in Section III.A., the works are not substantially similar, much less strikingly so.  
 (...continued)

1 **III. *KARMA!* AND *EARL* ARE NOT SUBSTANTIALLY SIMILAR.<sup>10</sup>**

2 **A. The Works Are Not Substantially Similar Under *Funky Films*.**

3 Plaintiff's failure to raise a genuine issue of material fact as to access by  
4 itself mandates summary judgment for Defendants. However, summary judgment  
5 is also required because Plaintiff fails to raise a genuine issue of fact as to  
6 substantial similarity of protected expression under the Ninth Circuit's extrinsic  
7 test: namely, that there must be "articulable similarities between the plot, themes,  
8 dialogue, mood, setting, pace, characters, and sequence of events." *Funky Films,*  
9 *Inc. v. Time Warner Entm't. Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006) (internal  
10 citations omitted); *see also Kouf v. Walt Disney Pictures & Television*, 16 F.3d  
11 1042, 1045 (9th Cir. 1984).

12 As a threshold matter, Plaintiff ignores or misstates three significant  
13 principles. First, contrary to Plaintiff's assertion, summary judgment is routinely  
14 granted under the extrinsic test, both in the Ninth Circuit and elsewhere.<sup>11</sup> As the  
15 court in *Funky Films* stated:

16 \_\_\_\_\_  
17 (...continued)

18 Moreover, Plaintiff's own expert concluded that the works were not strikingly  
19 similar and that he could not conclude that *Earl* was copied from Plaintiff's script.  
20 Supp. Rubin Decl., Ex. 1 (Deposition of David Nimmer ("Nimmer Depo.") at  
21 36:13-18).

22 <sup>10</sup> In his SAC, Plaintiff contended that the first three seasons of *Earl* infringed his  
23 screenplay. Defendants therefore addressed those allegations in their Motion. In  
24 his Opposition, Plaintiff and Nimmer focus only on season one. Thus, Plaintiff has  
25 abandoned any claim to substantial similarity based on subsequent seasons for this  
26 motion. The court therefore need only review Plaintiff's script and the pilot and  
27 the first season of *Earl*. Declaration of Jill P. Rubin in Support of Defendants'  
28 Motion for Summary Judgment ("Rubin Decl.") Exhs. D, F.

<sup>11</sup> *See also Merrill*, 2005 WL 395563 at \*9 (Wilson, J.) (summary judgment for  
defendants under extrinsic test); *Funky Films*, 462 F.3d at 1072 (same); *Rice*,  
330 F.3d at 1174 (same); *Cavalier v. Random House, Inc.* 297 F.3d 815, 822 (9th  
Cir. 2002) (same); *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996) (same);  
*Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984) (same); *see also*  
*Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1257 (11th Cir. 1999) (same);  
*Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996); *Beal v. Paramount Pictures*  
*Corp.*, 20 F.3d 454, 460 (11th Cir. 1994) (same); *Anderson v. Paramount Pictures*  
*Corp.*, 617 F. Supp. 1 (C.D. Cal. 1985) (dismissing plaintiff's copyright  
infringement claim with prejudice).



Although “summary judgment is not highly favored on the substantial similarity issue in copyright cases,” *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985), substantial similarity “may often be decided as a matter of law.” *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). Indeed, “[w]e have frequently affirmed summary judgment in favor of copyright defendants on the issue of substantial similarity.” *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990). *See Berkic*, 761 F.2d at 1292 (“we have frequently affirmed summary judgments in favor of copyright defendants on the substantial similarity issue”) (citing cases); *see also Kouf*, 16 F.3d at 1045-1046 (finding no substantial similarity as a matter of law).

Moreover, the normal summary judgment standard applies to copyright cases. *Kouf*, 16 F.3d at 1045 n.3 (rejecting contention that heightened standard applies in copyright cases).

Second, that both sides have experts does not require the Court to deny summary judgment. Courts have granted summary judgment for defendant where both sides submit expert testimony. *Rice*, 330 F.3d at 1179. Indeed, courts have so ruled even in cases where plaintiff had an expert and defendant did not.<sup>12</sup>

As discussed in detail in Defendants’ moving papers, summary judgment is required where a plaintiff merely seeks to protect ideas and *scenes à faire*. The most recent articulation of this principle is set forth in *Funky Films*, 462 F.3d at 1077, which mandates analysis of “not the basic plot ideas for stories, but the actual concrete elements that make up the *total* sequence of events and the relationships between the major characters.” Moreover, *Funky Films* cautions that “in undertaking the extrinsic test, the Court must take care to “filter out and

<sup>12</sup> *See Narrell v. Freeman*, 872 F.2d 907, 913 (9th Cir. 1989); *Olson v. Nat’l Broad Co., Inc.*, 855 F.2d 1446, 1450 (9th Cir. 1988) (affirming grant of judgment notwithstanding verdict).

1 disregard the non-protectable elements,” such as “*scenes à faire*, which flow  
2 naturally from generic plot-lines.” *Id.* at 1077 (internal citations omitted).

3 Finally, *Funky Films* instructs that differences between works play a  
4 significant role in application of the extrinsic test and that failure to credit these  
5 differences creates false impressions of similarity: “At first blush, these apparent  
6 similarities in plot [in the works at issue] appear significant; however, an actual  
7 reading of the two works reveals greater, more significant differences and few real  
8 similarities at the levels of plot, characters, themes, mood, pace, dialogue, or  
9 sequence of events.” *Funky Films*, 462 F.3d at 1078 at 1078; *Olson v. Nat’l*  
10 *Broad. Co., Inc.*, 855 F.2d 1446, 1450 (9th Cir. 1988).

11 Plaintiff’s Opposition ignores Ninth Circuit law and utterly fails to raise a  
12 genuine issue of material fact as to substantial similarity of protected expression.  
13 Under each category of the extrinsic test, Plaintiff fails far short of raising a  
14 genuine issue of fact as to protected expression.

15 ***Sequence of Events.*** As noted, the Court in *Funky Films* held that the  
16 extrinsic test requires an analysis of, among other things, “the actual concrete  
17 elements that make up the total sequence of events.” 462 F.3d at 1077 (internal  
18 citations omitted). Plaintiff’s opposition runs afoul of this mandate. Instead,  
19 Plaintiff and his expert purport to analyze the sequence of events (in conjunction  
20 with plot), but in fact ignore the concrete elements that make up the total sequence  
21 of events of *Karma!* and *Earl*.

22 In any event, as demonstrated in the Motion (Mot. at 14-16) the sequences of  
23 events in each work is *dissimilar* as a matter of law. To summarize, *Karma!* traces  
24 the travails of ex-cop Frankie through his arrest for bribery, imprisonment and  
25 release, his confrontation with an angel, and his involvement in a drug bust,  
26 leading to his death. *Earl*, a television comedy series, has no episode or series of  
27 episodes that contains a remotely similar sequence of events. Even alleged  
28 similarities upon which Plaintiff places heavy reliance – the winning of a lottery

1 and the main characters' arrest – occur at markedly different stages in each work.<sup>13</sup>  
 2 In short, *Karma!* and *Earl* share no substantial similarities in sequence of events.  
 3 It is highly significant that Nimmer conceded that the works' sequences of events,  
 4 in isolation, are not substantially similar. Nimmer Depo. 125:8-11.

5 **Plot.** “[G]eneral plot lines are not protected by copyright law; they remain  
 6 forever the common property of artistic mankind.” *Funky Films*, 462 F.3d at 1081,  
 7 quoting *Berkic*, 761 F.2d at 1293; *see also Weygand*, 43 U.S.P.Q.2d at 1125-26.  
 8 In an apparent attempt to make the works seems more similar than they are,  
 9 Plaintiff's Opposition relies only on general similarities and improperly ignores  
 10 plot differences. In so doing, Plaintiff fails to conduct the proper extrinsic test  
 11 analysis.<sup>14</sup>

12 Indeed, Plaintiff has not come close to raising a genuine issue of material  
 13 fact as to substantial similarity of plot. Instead, Plaintiff relies on selective,  
 14 abstract similarities that receive no copyright protection. For example, Plaintiff  
 15 cites as purported similarities that both main characters “fall” – one is hit by a car,  
 16 the other loses his job. The idea of a character “falling” is general and  
 17 uncopyrightable. Being hit by a car and losing a job as a police officer are  
 18 dissimilar. The assertion that both Frankie and Earl have karmic epiphanies is an  
 19 unprotected idea. At a concrete level, a confrontation with a super angel who can  
 20 fly is not similar to watching a real-life talk show host speak about his life. While  
 21 both Frankie and Earl win the lottery, they do so to different extents and use the

22  
 23 <sup>13</sup> Frankie is arrested at the beginning of *Karma!* whereas Earl is not arrested until  
 24 the end of Season Two of *Earl*. Thus, although both characters spend time in jail,  
 25 this occurs at entirely different points in the sequence of events.

26 <sup>14</sup> Moreover, a court must examine Plaintiff's claims of plot similarity through an  
 27 actual reading of the two works and an analysis of whether apparent plot  
 28 similarities are overcome by more significant *differences*. *Funky Films*, 462 F.3d  
 at 1078. However, Nimmer testified at deposition that he did not address any of  
 the differences in the works, because to consider the differences would have taken  
 hundreds of pages. Nimmer Depo. 113:20-114:7. This testimony demonstrates the  
 significant dissimilarity between *Karma!* and *Earl*. Accordingly, Plaintiff's  
 Opposition ignores even the major differences, as prohibited by *Funky Films*.

1 money for different purposes. Frankie wins \$2,000,000, half of which he uses to  
 2 build an orphanage; Earl wins \$100,000, enough to support his quest to make  
 3 amends with those on his list, but not enough to permit him to live anywhere other  
 4 than a motel.

5 Plaintiff also relies on alleged plot elements that are patently *dissimilar*.  
 6 For example, there is no substantial similarity between a picture of an angel  
 7 (*Karma!*) and a lottery ticket (*Earl*); or taking bribes as a police officer (*Karma!*)  
 8 and petty theft (*Earl*). And while Plaintiff claims that both Earl and Frankie are  
 9 guided by lists, the concrete expression of such an abstract concept is dissimilar.  
 10 Mot. at 14-15. Nimmer confirms this difference. Nimmer Depo. at 117: 22-24  
 11 (Q: “Does Frankie make a list of people he’s harmed?”; A: “Not that I recall.”)

12 In sum, the plots of the two works are not substantially similar. Nimmer  
 13 conceded that this was the case. Nimmer Depo. 125:3-7.

14 **Character.** Similarity between characters at an abstract level is insufficient  
 15 for a finding of substantial similarity. *Kouf*, 16 F.3d at 1045; *Funky Films*,  
 16 462 F.3d at 1079. Moreover, differences in characters are directly relevant to  
 17 analysis of substantial similarity. *Funky Films*, 462 F.3d at 1079. Finally, it is  
 18 improper under the extrinsic test to ignore characters that have no counterpart in  
 19 the other party’s work. *Id.* Proper application of the extrinsic test reveals that the  
 20 characters in the works here are dissimilar as a matter of law.

21 First, Plaintiff blatantly ignores differences between the main characters that  
 22 eviscerate any claim of substantial similarity. Frankie is a disgraced New York  
 23 City ex-cop and ex-con in his mid-forties with a bitter attitude, foul mouth, and  
 24 short temper who is a seasoned extortionist and who was kicked off the police  
 25 force for corruption. He has an unborn son. In contrast, Earl is an early thirties  
 26 “redneck” and likable loser with a positive, humorous attitude towards life who is  
 27 neither an ex-police officer (or a current police officer) nor a skilled shakedown  
 28 artist, but rather a bumbling ex-petty thief seeking reform. He does not die, has no

1 unborn son, and receives no otherworldly visitation. Yet Plaintiff and his expert  
 2 disregard these concrete differences and assert that the characters are similar  
 3 because both are white, lower class, and thieves with a history of “treating people  
 4 badly.” Opp. at 12. Such an analysis is precisely the type that the Ninth Circuit  
 5 has rejected.

6 The only other characters that Nimmer compares are Toni Ann from *Karma!*  
 7 and Joy from *Earl*. Again, the alleged similarities relate to abstract elements that  
 8 are not copyrightable. Swearing, drug use, the ability to handle a gun, and  
 9 cynicism are simply too abstract for copyright protection. And nowhere does  
 10 Plaintiff’s Opposition consider the concrete differences between these characters,  
 11 as described in the Motion (Mot. at 16-18).<sup>15</sup>

12 Moreover, by omitting a discussion of other key characters in the two works  
 13 – e.g., the Angel, the villainous James Ransom, and Father Augustus from  
 14 *Karma!*; Randy and Catalina from *Earl* – Plaintiff has ignored the Ninth Circuit’s  
 15 mandate to consider characters who have no counterpart in the opposing party’s  
 16 work. Again, in deposition testimony, Nimmer admitted that taken “just as  
 17 characters” the characters in *Karma!* and *Earl* are not substantially similar.  
 18 Nimmer Depo. 126:10-13.

19 **Mood.** *Karma!* is a drama while *Earl* is a comedy. Second Amended  
 20 Complaint (“SAC”) ¶14, Declaration of David Nimmer, Exh 1 (“Nimmer Report”)  
 21 at ¶15. Plaintiff’s claim that *Karma!* is a “drama punctuated by comedy” is  
 22 tenuous at best. Nimmer Report” at ¶15; Declaration of Jeff Rovin, Exh 1 (“Rovin  
 23 Report”) at ¶¶34-35. But even assuming *arguendo* that Plaintiff’s characterizations  
 24 are accurate, the moods still are not substantially similar—a comedy (*Earl*), by  
 25

26 <sup>15</sup> The other characters that Plaintiff compares – Shrimp from *Karma!* and Darnell  
 27 aka Crabman from *Earl* – bear no similarity to each other for the reasons discussed  
 28 in the Motion. The otherwise completely dissimilar characters named Sonny and  
 Coco in both works have no significance for the reasons discussed in the Motion.  
 Again, Nimmer does not refer to them.

1 definition, differs from a drama that is punctuated by comedy (*Karma!*). Of  
 2 course, that two works have comedic elements does not make them substantially  
 3 similar. For example, the movie *Animal House* is not substantially similar to  
 4 Woody Allen's *Annie Hall* even though both are comedies. As a matter of law, the  
 5 moods of the two works at issue differ – Plaintiff's dark and violent *Karma!* is  
 6 highly dissimilar to the quirky, farcical *Earl*. Once again, in deposition testimony  
 7 Nimmer admitted that, alone, the moods of *Karma!* and *Earl* are not substantially  
 8 similar. Nimmer Depo. at 125:20-23.<sup>16</sup>

9 **Pace.** It is undisputed that the two works are paced differently: *Karma!* is  
 10 paced as a feature-length motion picture while *Earl* is paced as an episodic one-  
 11 half hour television series. See SAC at ¶ 2(d)(ii), Nimmer Report at ¶19. In  
 12 deposition testimony, Nimmer stated that he had no opinion whether the pace of  
 13 *Karma!* and *Earl* are substantially similar. Nimmer Depo. at 126:4-9.<sup>17</sup>

14 **Dialogue.** “[E]xtended similarity of dialogue [is] needed to support a claim  
 15 of substantial similarity based upon this issue.” *Olson*, 855 F.2d at 1450 (9th Cir.  
 16 1988); *Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1185 n.67 (C.D. Cal  
 17 2001) (“[p]laintiffs again confuse the ‘idea’ conveyed by a particular piece of  
 18 dialogue with the protectable ‘expression’ thereof.”). No such extended similarity  
 19 exists here. Plaintiff asserts, for example, that both Frankie and Earl shout toward  
 20 the sky, a trivial similarity at best. Moreover, the actual dialogue that each  
 21 character speaks is dissimilar. Rubin Decl., Exh. D at 127. And I’m not  
 22 apologizing for that either!”; Rubin Decl., Exh. F (Episode 16: *Earl*): “Again!”

23  
 24 <sup>16</sup> See, e.g., *Rosenfeld v. Twentieth Century Fox Film*, 89 U.S.P.Q.2d 1797, 2009  
 25 WL 212958, \*3 (finding the two works’ moods were substantially different: “The  
 26 darker, more dramatic production envisioned by Plaintiffs, who describe it as a  
 27 cross between a Broadway play and a theme park attraction, is nothing like the  
 28 [defendants’] light-hearted and funny animated movie.”)

<sup>17</sup> See, e.g., *Rosenfeld*, 89 U.S.P.Q.2d 1797, 2009 WL 212958, \*3 (finding the two  
 works’ pace were substantially different because “[plaintiff’s work] is designed to  
 be an interactive live action show, while [defendants’ work] is an animated  
 movie.”)



1 Come on I'm trying here? You saw me tryin'! That guy slammed the door in my  
 2 face! You know what that's it! I'm goin' back to the party, so if you wanna punish  
 3 me, gimme your best shot!...I will not be karma's bitch!"). Moreover, although  
 4 Plaintiff's Opposition asserts that both Frankie and Earl tell the main female  
 5 character that they'll "regret" having sex, Nimmer admitted that this was in error  
 6 and that Earl never uses those words. Nimmer Depo. at 82:3-6. Further, Nimmer  
 7 admitted that the dialogue of *Karma!* and the dialogue of *Earl* are not substantially  
 8 similar. *Id.* at 130:24-131:3.

9 **Setting.** The only substantive similarity Plaintiff alleges as to setting is that  
 10 both works are set in some kind of city (Opp. at 12). Plaintiff, however, admits  
 11 that *Karma!* takes place in a big city setting (New York City) while *My Name Is*  
 12 *Earl* has a small city setting (an unidentified middle-American town) (Opp. at  
 13 12).<sup>18</sup> The two settings are thus dissimilar. Further, as is characteristic of his  
 14 opposition, Plaintiff ignores the other significant differences in setting (e.g., urban  
 15 New York and night clubs in *Karma!* as opposed to trailer parks and strip malls in  
 16 *Earl*). Moreover, Nimmer admitted that, taken by themselves, the settings of  
 17 *Karma!* and *Earl* are not substantially similar. Nimmer Depo. at 125:24-126:3.

18 **Theme.** Potential similarity in theme alone is insufficient to defeat summary  
 19 judgment on substantial similarity. *Weygand*, 43 U.S.P.Q.2d at 1126-27. Indeed,  
 20 Nimmer freely admitted that, alone, the "central theme" of the two works – turning  
 21 bad Karma into good or making amends – is an idea, not expression, and hence  
 22 unprotectable. Nimmer Depo. at 97:24-98:21; 120:5-7. Moreover, Nimmer  
 23 admitted that the concepts of people who do bad things changing their ways in an  
 24 attempt to improve their lives and of bad karma manifesting itself in future  
 25 endeavors are *scenes à faire* of a work about karma. *Id.* at 102:6-9; 104:10-13.

26  
 27  
 28 <sup>18</sup> Plaintiff also claims that both works take place in the present. Opp. at 12. Such  
 a "similarity" is hardly a "substantial similarity of protected expression."

1 In sum, properly analyzing each element under the extrinsic test, the works  
2 at issue are not substantially similar in protected expression.

3 **B. Plaintiff's Attempt To Create Disputed Issues Of Fact On**  
4 **Substantial Similarity Is Unavailing.**

5 Plaintiff cites *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002), for the  
6 proposition that “when individual elements of a literary work are not individually  
7 protectable, those same elements, taken together, may nevertheless be protectable  
8 when placed in an original selection or arrangement.” Opp. at 29. *Metcalf* is  
9 inapposite, undermining the entire premise of Plaintiff’s opposition.

10 In *Metcalf*, plaintiff sued for copyright infringement arising out of  
11 defendants’ television series. Significantly, the defendant in *Metcalf* – in contrast  
12 to Defendants here – *conceded* access for the purposes of summary judgment. In  
13 finding a triable issue of fact as to substantial similarity, the Ninth Circuit, based  
14 on defendants’ concession of access, applied the so-called “inverse ratio rule,”  
15 noting that plaintiff’s claim of similarity was “strengthened considerably by [the  
16 defendant’s] concession of access to their works.” 294 F.3d at 1075. In the instant  
17 case, of course, not only do Defendants not concede access, but access is absent as  
18 a matter of law. As a result, established Ninth Circuit law holds that *Metcalf* has  
19 no application.

20 *Rice*, 330 F.3d at 1178, is controlling. In *Rice*, the plaintiff claimed that he  
21 communicated the details of his work to the agent for one of the defendants. In  
22 addition, the plaintiff in *Rice* was represented by another agent in the same agency.  
23 On appeal, the Ninth Circuit affirmed summary judgment for the defendant under  
24 the extrinsic test, *separately* analyzing the relevant categories under the extrinsic  
25 test – character, plot, setting, sequence of events, mood and pace. As to each  
26 individual category, the court determined that there was no substantial similarity  
27 *Id.* at 1176-77.



1 The Ninth Circuit went on to address plaintiff's claim that, notwithstanding  
 2 the absence of substantial similarity as to each literary category, *Metcalf* somehow  
 3 salvaged his claim because both works had a substantially similar selection and  
 4 arrangement of similar elements. In other words, the plaintiff in *Rice* made the  
 5 identical claim that Plaintiff makes here. *Rice* squarely rejected this claim:

6 [H]ere we are not presented with the same pattern of generic similarities as  
 7 in *Metcalf*. And even more important, our decision in *Metcalf* was based on  
 8 a form of inverse ratio rule analysis: the plaintiff's case was "strengthened  
 9 considerably by [defendants'] concession of access to their works." *Id.* at  
 10 1075. In *Metcalf*, the writer and producer of the allegedly infringing work  
 11 conceded that they had read the plaintiff's work. Here, there is no such  
 12 concession of access as most of Rice's claims are based purely on  
 13 speculation and inference. Because we are not confronted with the same  
 14 totality of similarities and the same degree of access, this case is readily  
 15 distinguishable from *Metcalf*.

16 *Accord, Funky Films*, 462 F.3d at 1082 n. 4 (distinguishing *Metcalf* where access is  
 17 not conceded; *Metcalf* does not apply where alleged elements not numerous  
 18 enough for protection). *See Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003).

19 *Rice* and *Funky Films* are fatal to Plaintiff's substantial similarity claim.  
 20 Here, access is not only hotly contested, it does not exist. Indeed, as noted, the  
 21 access in *Rice* – deemed *speculative* and *conjectural* – also involved an alleged  
 22 submission to a talent agency, and the access chain was closer than it is here.  
 23 Because *Metcalf* is inapplicable, Plaintiff's argument fails as a matter of law.

24 *Metcalf* is inapplicable for a second reason. There, the court found that both  
 25 works at issue contained a *pattern of similar* elements. *Rice*, 330 F.3d at 1178. In  
 26 this case, Plaintiff seeks to protect categories of elements that are *different*, even by  
 27 his own expert's account. And neither Plaintiff's Opposition nor his expert  
 28 declaration addresses the question whether the works have a substantially similar

1 pattern, as existed in *Metcalf*. Nimmer Depo. at 125:8-11.<sup>19</sup> Indeed, prior works  
 2 exist containing the same elements of which plaintiff complains here (e.g.,  
 3 *Highway to Heaven, A Christmas Carol, Almost An Angel*).<sup>20</sup> To adopt Plaintiff's  
 4 assertion that a few, highly abstract purported similarities between Plaintiff's script  
 5 and a long-running television series give rise to substantial similarity of protectable  
 6 expression would ignore the well-established law of this Circuit and would be  
 7 anathema to the core concept that, as a matter of free speech, copyright law does  
 8 not permit an author to monopolize ideas. *Eldred v. Ashcroft*, 537 U.S. 186, 219  
 9 (2003) (dissemination of copyrighted works advances significant speech interests).

10 In sum, none of the salient categories is substantially similar in protected  
 11 expression. Even Plaintiff's own expert concedes as much. Under *Rice* and *Funky*  
 12 *Films*, summary judgment is required.<sup>21</sup>

13 Neither does Nimmer's declaration avoid summary judgment. As discussed  
 14 above, Nimmer acknowledged in deposition that all but one of the categories under  
 15

---

16 <sup>19</sup> Plaintiff also makes the unsupported claim that Defendants have not met their  
 17 burden to establish that any alleged similarities between *Karma!* and *My Name Is*  
 18 *Earl* are *scenes à faire*. Opp. at 31. Regardless of who has the burden, Defendants  
 19 have provided significant and uncontroverted evidence that establishes that the  
 elements at issue are *scenes à faire*. (Rovin Report ¶¶ 11-55). Nimmer's report is  
 silent on this issue other than a preliminary note that he purportedly focused on  
 elements that he did not consider to be *scenes à faire*. Nimmer Report. ¶6.

20 <sup>20</sup> Realizing that the prior art proffered by Defendants is devastating to his claims,  
 Plaintiff objects to introduction of these three works on the grounds of "relevance."  
 21 Yet, as Nimmer testified in his deposition, analysis of prior art is relevant to a  
 determination of whether particular elements constitute *scenes à faire*. Nimmer  
 22 Depo. at 88:3-7. *See also Satava* 323 F.3d at 812 (relying on prior art, namely  
 23 photographs of glass-in-glass jellyfish sculptures (none of which was identical to  
 each other), the Ninth Circuit concluded that the combination of elements plaintiff  
 claimed to be substantially similar was unprotected).

24 <sup>21</sup> Plaintiff suggests that a district court case, *Fleener v. Trinity Broad. Network*,  
 25 203 F.Supp.2d 1142 (C.D. Cal. 2001), should apply instead of the Ninth Circuit's  
 decision in *Funky Films*, 462 F.3d 1072, a case decided five years later. Even if an  
 26 earlier-decided district court case could trump the Ninth Circuit's holding in *Funky*  
*Films* (and it cannot), *Fleener* is inapposite. There, the court found substantial  
 27 similarity in theme, setting, sequence of events and plot. Here, even Plaintiff's  
 own expert concedes that no such substantial similarity of individual elements  
 28 exists.

1 the extrinsic test are not substantially similar and that the one that purportedly is –  
 2 theme – is unprotected idea. Although Nimmer purports to rely on a *Metcalf*-type  
 3 analysis (though he never mentions the case) he admitted that he did not assess the  
 4 issue of access, which is the precondition for application of *Metcalf*. For the  
 5 reasons discussed above, it is inappropriate to aggregate purported generic  
 6 similarities absent a concession of access (which has not occurred here).

7 Moreover, Nimmer’s report is not competent on the issue of substantial  
 8 similarity because it does not conclude that the works are substantially similar, but  
 9 rather is a legal opinion. His report merely concludes that “the facts at bar present  
 10 a *situation* in which substantial similarity presents a *triable issue of fact*” (Nimmer  
 11 Report, ¶28) (emphasis added). But, of course, whether a triable issue of fact  
 12 exists is a question of law to be decided by the Court (*see* Fed. R. Civ. P. 56) and is  
 13 not subject to expert testimony. Fed. R. Evid. 702; *see Aguilar v. Int’l*  
 14 *Longshoremen’s Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (matters  
 15 of law are “inappropriate subjects for expert testimony”); *Ideal World Marketing,*  
 16 *Inc. v. Duracell, Inc.*, 15 F. Supp. 2d 239, 244 (E.D.N.Y. 1998) (disallowing an  
 17 expert report offered with a motion for summary judgment, stating that “this  
 18 proposed ‘expert’ report, which offers a legal conclusion based upon the  
 19 undisputed facts before the Court, impinges upon the Court’s role”); *see also Icon*  
 20 *Enter. Int’l, Inc. v. Am. Prod. Co*, No. CV 04-124, 2004 WL 5644805, \*4, (C.D.  
 21 Cal. Oct. 7, 2004) (Wilson, J.) (“Similarly, instructing the jury as to the applicable  
 22 law ‘is the distinct and exclusive province’ of the court”) (citations omitted).  
 23 Nimmer acknowledges as much, conceding that he is not a literary expert, and thus  
 24 can only opine on issues of pure law. Nimmer Depo. at 10:21-11:22.<sup>22</sup>

25 \_\_\_\_\_  
 26 <sup>22</sup> The Nimmer Report contains other inadequacies. He acknowledged that his  
 27 methodology was solely to “focus on the points of similarity,” Nimmer Depo. at  
 28 214:11-216:10. He therefore failed to consider significant differences, as required  
 by *Funky Films*, despite stating that he “could have gone on for hundreds of pages  
 about the differences between the two works” and agreeing that in general, one  
 must evaluate differences as well as similarities to determine if two works are  
 (...continued)

1 In sum, like the plaintiff in *Funky Films*, Plaintiff has put forward a list of  
 2 “apparent similarities” that upon “an actual reading of the two works reveals  
 3 greater, more significant differences and few real similarities at the level of plot,  
 4 characters, themes, moods, pace, dialogue, or sequence of events.” Plaintiff  
 5 further attempts to concoct substantial similarity by creating “a compilation of  
 6 random similarities scattered throughout the works,” an approach that is inherently  
 7 subjective and unreliable. *Cavalier*, 297 F.3d at 825 quoting *Litchfield v.*  
 8 *Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1994); *Kouf*, 16 F.3d at 1045-46  
 9 (rejecting plaintiff’s “compilation of ‘random similarities throughout the works’”);  
 10 *Rosenfeld*, 89 U.S.P.Q.2d 1797, 2009 WL 212958, \*6-7 (finding “unconvincing”  
 11 plaintiff’s list of random similarities). Because the works here are not substantially  
 12 similar under the extrinsic test, summary judgment for Defendants is required.

#### 13 **IV. CONCLUSION**

14 For the foregoing reasons and the reasons set forth in Defendants’ motions  
 15 for summary judgment, Defendants are entitled to judgment as a matter of law.

16  
 17 Dated: March 16, 2009

MITCHELL SILBERBERG & KNUPP LLP

18  
 19 By: /s/ Robert H. Rotstein

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 Garcia, Twentieth Century Fox Film  
 Corporation, and Twentieth Century Fox  
 Home Entertainment LLC

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 (...continued)  
 26 substantially similar. *Id.* at 214:11-216:10; 216:23-217:3. Asked where any such  
 27 differences were reflected in his report, Nimmer testified that he “did not prepare  
 28 [his] report as a comprehensive guide to the trier of fact,” having instead prepared  
 it “to include all the conclusions [he] might testify to in favor of the party who  
 retained [him].” *Id.* at 217:8-16.